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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 49

ZENITH RADIO CORPORATION, PETITIONER

v.

HAZELTINE RESEARCH, INC., AND HAZELTINE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of November 25, 1968, inviting the Solicitor General to file a brief expressing the views of the United States.

QUESTIONS PRESENTED

In this brief we shall discuss the following questions:

1. Whether the evidence is sufficient to support findings that patent pools in Canada, England and Australia injured Zenith by restraining the latter in its business of exporting television and radio receivers from the United States.

2. Whether Hazeltine Research, Inc. ("HRI") participated in unlawful conspiracies and combinations in restraint of the trade in television and radio receivers between the United States and foreign nations when it appointed, as the exclusive licensee of its television and radio patents in Canada and England, patent pools in each of those countries.

3. Assuming that HRI so participated in an unlawful conspiracy or combination, whether Zenith's continuing exports to Canada and its plans for entering the English market justify an injunction proscribing HRI's continuing participation in foreign patent pools.

4. Whether HRI's misuse of its domestic patents included its refusal to license them except at a fee measured by the licensee's full production of television receivers, including sets that made no use of any item covered by an HRI patent.

STATEMENT

I. THE HISTORY OF THE LITIGATION

Petitioner, Zenith Radio Corporation, is one of the principal manufacturers of radio and television sets in the United States, having had, during the period in issue here, some 15 to 20 percent of the domestic market for home television receivers (I A. 503; DX 218, VI A. 2621; IX A. 4256).[1] Respondent Hazeltine

[1] Roman numerals refer to the printed volumes of the record in this Court. "DX" and "PX" refer to defendant's (Zenith) and plaintiff's (HRI) exhibit numbers. The record citation following an exhibit number is to the printed copy of the exhibit.

Research Corporation is a wholly owned Illinois subsidiary of respondent Hazeltine Corporation (VI A. 2893). The business of the two Hazeltine companies, and their affiliates, grew out of the early radio inventions of Allen Hazeltine (I A. 145). The Illinois subsidiary, which we shall hereafter refer to as "HRI," is a research and development company which owns and licenses United States—but not foreign—patents, mainly relating to television and radio receivers (I A. 20, 142). The parent is a research, development, and manufacturing company which produces various electronic equipment (I A. 145; DX1, III A. 940–947). It owns foreign patents for television and radio inventions but owns no domestic patents (I A. 145; DX 1, III A. 940–47).

Up to May 1959, Zenith had taken standard package licenses which HRI offered to cover all of its patents. The final five year license expired in May 1959, and Hazeltine requested that it be renewed. Zenith refused, contending that no license was needed (VI A. 2894).

This litigation began in November 1959, when HRI sued Zenith for patent infringement in the United States District Court for the Northern District of Illinois. The alleged infringement was of a patent which covered a device used in television receivers to adjust automatically incoming signals to a uniform strength (I A. 11–13). On May 22, 1963, Zenith, by leave of the district court, filed a counterclaim for damages under Section 4 of the Clayton Act and for injunctive relief under Section 16 of that Act, claiming that HRI had misused its domestic patents and

had injured Zenith's export business by participating in patent pools in Canada, England and Australia (I A. 64–69).

The district court tried the factual questions relating to HRI's patent infringement claim in October 1963 (I A. 2) and held a further trial in February 1964 on the antitrust and patent misuse charges of Zenith's counterclaim (I A. 3). The court held that the patent claims relied on in the infringement action were invalid (VI A. 2891), and the court of appeals affirmed this conclusion. (IX A. 4238, 4244–4249) On the counterclaim, the district court ruled (1) that HRI had misused its domestic patents, and (2) that through its participation in the Canadian, English and Australian patent pools, it had violated the Sherman Act. Findings entered on January 25, 1965, awarded Zenith damages that, after trebling, totaled approximately $48.7 million for injuries to its export business and $150,000 for misuse of HRI's domestic patents. (VI A. 2898; VII A. 3078, 3539.)

On March 26, 1965, HRI, through counsel retained after the entry of these findings (I A. 4), moved for withdrawal of the findings and leave to undertake further discovery and offer further proof. (VII A. 2939–2951). The district court heard additional evidence, which demonstrated that government embargoes on the importation of television and radio sets into England and Australia, which were instituted in World War II, remained in effect until 1959 and 1960, respectively. On the basis of that proof the court reduced the trebled damages to a total of approximately $35 million. (VII A. 3239.) The court declined, however,

to reopen the record for further proof as to the impact of the foreign patent pools on Zenith's business (VII A. 3204). The court also enjoined HRI from participating in or aiding the efforts of any foreign patent pool to prevent Zenith from exporting its products into any foreign market; from conditioning a license under any of its domestic patents on the taking of a license under any other patent or offering to license any patent at rates as high as that charged for a package license; and from requiring payment of royalties under a license on the manufacture of unpatented products. (VII A. 3079, 3080.)

The court of appeals reversed both the damage award ($35,000,000) and the injunction relating to participation of HRI in foreign patent pools (IX A. 4239, 4254). It affirmed the damages awarded ($150,000) for patent misuse (IX A. 4253), but modified the pertinent injunctive provisions in certain respects (IX A. 4262).

II. THE FOREIGN PATENT POOLS

HRI has followed the same general pattern in giving control of foreign exploitation of its patents to patent pools in Canada, England, and Australia. Beginning in the early days of radio, manufacturers in each of those countries, including subsidiaries of American companies, pooled their radio patents. HRI's patents were placed under the exclusive control of each pool, either through a direct arrangement by which HRI gave the pool exclusive rights to license its patents in the country involved or through

a similar agreement with a company that itself was a member of the pool. The original pool agreements provided that no patent would be licensed except on terms agreeable to the members of the pool, that licenses would be granted only for the package of all patents within the pool, that no license would be granted to allow importation into the particular country, and that all licenses would be at a fee measured by the licensee's total production including receivers that did not use any patent covered by the license (VI A. 2899, 2908, 2906–2907).

There are, however, a variety of circumstances that vary from country to country and are of importance in considering the court of appeals' holding that Zenith had failed to demonstrate injury to its trade or business of exporting radio and television receivers to the three foreign nations. We shall, therefore, set out in the following portion of this Statement what we consider to be the principal facts bearing on each of the three pools and on Zenith's dealings or attempts to deal in each of the three countries.

A. THE CANADIAN POOL

The Canadian pool is called Canadian Radio Patents Limited (CRPL). It was formed in 1926 by Canadian subsidiaries of General Electric and Westinghouse (VI A. 2903). HRI began to participate in 1943 when it entered into an exclusive license agreement with the pool, which ran beyond the date of the filing of the counterclaim in the instant case (VI A. 2903).

The organization, purposes and function of the pool follow the general pattern. Licenses are limited to manufacture in Canada (VI A. 2903–2904). To police its policy of excluding imported products from the Canadian market, CRPL has used patent agents and investigators to locate and stop the sale of imported receivers. The district court found that suits or the threat of suits kept dealers from handling American made sets. (VI A. 2904.) A number of documentary exhibits evidence the pool's interest in barring exports from the United States; such evidence includes reports of pool meetings and threats made to Canadian distributors of Zenith products in the early and mid-fifties, and advertisements published up to the middle of 1958 threatening sellers and users of unlicensed merchandise with infringement actions. (DX 129, 131–141, 143, 144, 155–162, IV A, 1844, 1865–1958; V A. 1959–1972, 2022–2046).

The district court also found that Zenith "[f]or many years" had attempted to set up distribution of its products in Canada but that "in every instance" its dealers encountered threats of suits by CRPL (VI A. 2905). The court further found (*ibid.*) that "To ward off these attacks" Zenith sought a license "but in every instance" was told that no license for imports would be granted. The evidence shows that between 1927 and 1953 Zenith made five attempts to secure a license covering export of radios from the United States into Canada. In 1927 it was told that it could have a license but that exports would be limited to a value of $100,000 a year (DX 146, V A. 1982–1987), which Zenith said was not worth its while

(DX 147, V A. 1989). In 1930, Zenith was told that no new licenses were then being granted (DX 147, V A. 1989–1991). In 1936, Zenith was told that "[b]y reason of the requirements of the Canadian Patent Act it is not the policy of" the pool "to grant licenses for the importation of radio receiving sets into Canada." (DX 148, V A. 2005–2006.) Another inquiry was made in 1951, but apparently produced no information of a change in policy (DX 149, V A. 2009–2011). The Canadian pool rejected the last request for a license made in 1953, on the ground that "There has been no change in the 'working in Canada' requirements of the Canadian Patent Act or in the specific rulings * * * given by the Canadian Commissioner of Patents to the effect that [the pool] cannot grant licenses for importation." (DX 150, V A. 2012–2014).

In 1951 Zenith attempted to distribute American-made radio receivers through a Canadian company, but it stopped doing so after warnings were issued by the Canadian pool (DX 155–158, V A. 2022–2028). In 1952 and 1953, Zenith declined requests to export radios to Canada, attributing its action to the Canadian pool. (DX 159–160, V A. 2029–2032.) In 1954, when it again sought to distribute its American made equipment in Canada, its distributor, Ideal Electric Supply Company, was met with objections from the Canadian pool (DX 161–162, V A. 2033–2046).

Insofar as this record discloses, Zenith made no attempt to distribute its equipment in Canada during the next several years. Then, in 1957, it settled treble damage litigation which it had brought against Radio

Corporation of America, General Electric Company and Western Electric Company, which involved, *inter alia*, the activities of those American companies in the Canadian patent pool. That settlement gave Zenith $10 million and world-wide rights under the patents of the three defendants, including the patents of their foreign subsidiaries (DX 114, IV A. 1607, 1610, 1616–1617, 1622–1623, 1628–1629). Zenith executed a release that absolved the defendants from any further liability for damages resulting at any time—past or future—from their acts up to the date of the settlement (DX 48, VI A. 2783, appendix in the court of appeals, p. 1883). Prior to the settlement of this litigation Zenith learned of the opinion of RCA's patent counsel that Canadian law did not prevent the licensing of patents for import into that country (I A. 484–485).

Thereafter, Zenith sought to sell its American made radios and television sets in Canada, taking the view that the licenses it had received in the 1957 settlement were sufficient to cover the merchandise it would export to Canada (VA. 2905). Representatives of the Canadian pool asserted to Zenith that its products made use of patents not covered by the 1957 licenses, including some of HRI's, that were within the Canadian pool, that Zenith would need a pool license to do business in Canada, and that no imports would be permitted. (DX 151–153, VA. 2014–2020; VI A. 2905, I A. 410–411).

Zenith's then president testified at trial that Zenith had attempted to obtain Canadian distributors for its radios and television sets. He said that distributors had been found in the western provinces, but that

Zenith had been unable to find Canadian companies willing to handle its radio and television products elsewhere in Canada, and that potential distributors based their refusals on their fears of infringement actions by the Canadian pools. He stated that Zenith had used its own subsidiaries—whose business previously was restricted to hearing aids—to distribute in the central provinces and, with less success, in the Maritime provinces. Although he did not specifically state when these attempts were made, they were after 1958. He also testified that the inability to establish a television distribution system had impaired Zenith's ability to sell radios in Canada. (I A. 472–473.)

The only documentary evidence showing efforts by the pool to enforce its patents against imports after 1958 is a 1962 letter from a man in Nova Scotia who had handled Zenith's products in the early fifties, but had dropped the line when threatened with infringement action by the pool. The 1962 letter said that a Motorola dealer in the vicinity had received a threat comparable to the one the author had received some ten years before; a copy of the letter from the pool's president to the Motorola dealer was attached (DX 162–D, V A. 2053–2056).

The district court found that the Canadian Patent Act did not require that licenses be limited to local manufacture. It further found that HRI was fully aware of the purpose and policy of the Canadian pool to exclude imports (VI A. 2906). The court concluded that by participating in the pool HRI had violated the Sherman Act (VI A. 2912). Treble damages of $18,892,173 were assessed (VII A. 3079, 4254). The

damages were based on the testimony of Zenith's then President, Mr. Wright, and Executive Vice-President and Treasurer, Mr. Kaplan, that, in the absence of the Canadian pool, Zenith would have had the same 15 to 20 percent of the market in Canada as it has in the United States (I A. 457, 528).

The court of appeals held that the district court finding of the "fact" of damage was clearly erroneous (IX A. 4254). While recognizing that there was "some slight evidence of the *fact* of damage", the court noted that during the damage period under the four-year statute of limitations (1959–1963), Zenith had sold 65,000 radios and nearly 60,000 television sets in Canada; that Zenith had not sought a pool license after 1953; that there had been no threat of suit for importing radios since 1957; and that the evidence did not demonstrate that the Canadian pool's 1958 advertisement had adversely affected Zenith's sales. The court also relied on the facts that Zenith neither had called any Canadian distributor to testify nor had shown the experience of its American competitors who were doing business in Canada; that Zenith had spent a significant amount on advertising in Canada; and that the pool had made no efforts to prevent imports during the damage period. In conclusion, the court of appeals evinced "a firm conviction that the district court made a mistake in inferring from the entire testimony that the essential element of *fact* of damage had been established by Zenith." (IX A. 4258–4260; emphasis original.)

B. THE ENGLISH POOL

The district court found that the dominant radio and electrical companies in Great Britain had set up the English patent pool into which flowed thousands of patents owned or controlled by these companies and others affiliated with them in the pool (VI A. 2829). HRI's patents entered the pool in 1930 pursuant to an agreement (DX 43, III A. 1167–1169; see, also, DX 42, III A. 1165–1166) with General Electric Co. Ltd., which was the exclusive English licensee of HRI's patents and had the right to sublicense (VI A. 2829). General Electric—acting both for itself and on behalf of Hazeltine—contractually agreed with the other pool members that the pooled patents would be licensed for use in Great Britain only on terms agreeable to all pool members. The pool agreement expressly provided that only package licenses would be granted and that licenses would be limited to local manufacture. The form of license used by the pool has always required payment of royalties measured by the value of the licensee's entire production, whether or not any of the pool patents were used. (VI A. 2900.) The district court found that HRI participated in the pool with full knowledge of these agreements "for the purpose and effect" to exclude American and other imported products from the English market, and that HRI was participating in the pool at the time of trial "and intends to continue its participation" (VI A. 2900).

Zenith's then President, Wright, testified that in mid-1955 he had asked a representative of the pool whether Zenith could be licensed to import radios

and/or television sets into Great Britain, and that the representative confirmed his understanding that "the policy of the pool * * * required that sets be made in England, and that nothing would be licensed if it was imported from abroad * * *." The Zenith President further testified that the pool's representative "saw no possibility" that this policy would be modified in the future (I A. 462–463).

Thereafter, Zenith interested an English company owned by a man named Adam Ramsey in distributing Zenith radios in Great Britain; Wright testified that "the pool has not bothered him insofar as radio is concerned". The latter fact was attributed to the expiration of significant radio patents. (Id., 463–464.)

Wright further testified that at that time Zenith made no effort to export television sets to Great Britain because there was no possibility of getting a license from the pool (*id.*, 464). He said that from 1958 on Zenith had spoken to several men in England about selling radios, "but we were given to understand that the television was just out of the question" (*id.*, 474).

Zenith officials recognized that there were technological differences between the systems used to transmit television signals in the United States and England, and in the circuitry of the receivers required to receive those signals (I A. 464–465). Thus English television transmissions were then using AM sound and a 405 line per second picture scanning system, whereas the Zenith sets were made to receive FM sound and 525 and 625 line scanning signals. (Great

Britian began to use the 625 line system after the end of the damage period in issue here.)' (IX A. 4257.) Wright testified, however, that adjustments "could" be made in the distributor's shop to adapt Zenith's sets to English requirements (I A. 464, I A. 545). While Zenith's Executive Vice-President Kaplan acknowledged that such changes could not be done on a large scale basis, he and Wright testified that Zenith could produce a set designed for the English system with no more difficulty than would be involved in producing a new model for sale in the United States and Kaplan asserted that such a set would have many components in common with the sets produced to receive United States transmissions (I A. 464, II A. 530–531, 543–546).

The district court found that Zenith had made "every effort" to enter the English market, but had been thwarted by the pool's refusal to license imports (VI A. 2912). It awarded Zenith $30,746,778 in treble damages (VI A. 3539, IX A. 4254). This award was based on the testimony of Wright and Kaplan that in the absence of the pool Zenith would have achieved a share of the English market equivalent to 20–25 percent of its penetration of the United States market, *i.e.*, 3 to 5 percent of the English market (I A. 465, II A. 529).

After the entry of these findings, the court allowed Hazeltine to prove that a government-imposed embargo had forbidden importation of television sets and radios into England from the beginning of World War II until June 8, 1959 (See VII A. 3524–3525). When recalled to the stand to testify with respect to these embargoes, Wright and Kaplan

acknowledged, that, at the time of their original testimony, they had been aware of government barriers to imports into England and Australia; they said, however, that they had not understood those barriers to be an absolute prohibition but had thought that, with some effort, import licenses could have been obtained. They further asserted that the existence of the barriers had been among the factors upon which they had based their original testimony as to the market share that Zenith could have obtained in England and Australia. They said that their estimates of expected shares of the English and Australian markets had assumed that business began from "scratch" in June 1959, and that the estimates of market share given should be taken as an average figure for the damage period and not as an amount that would be achieved in each year of that period (VII A. 3453–3455, 3521–3522). When asked about tariffs and shipping costs, they asserted that Zenith would be able to sell in England even if those factors required it to charge a higher price than its competitors; as for the prior testimony that Zenith sets could be adjusted by a distributor to receive English stations, they conceded they knew of no instance where that had been done (VII A. 3472–3477, 3498–3503).

After hearing the evidence relating to the embargo, the district court held (*id.*, 3524–3525) that "there could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I found, and reiterate existed at the time of the damage period." Turning to evidence developed during the hearing on the embargo to the effect that Zenith would have had to sell at

a price higher than its competitors (*id.*, 3513–3515, 3519–3520), the court said that Zenith (*id.*, 3525),

> must of necessity have sold for much more [than its would-be competitors] in the United Kingdom and Australia. However, because of the fact that it's a premium article, I feel certain that there would have been those, after becoming convinced, who would have paid that premium to obtain a Zenith.

The court concluded that "it would be unrealistic to indicate that Zenith suffered any economic loss by virtue of the pools" up to the lifting of the embargoes. The court also expressed "difficulty in believing" that Zenith "could have obtained the profits * * * that are indicated by the guesstimate which everybody indicates is" the basis for the original computation of damages; Wright and Kaplan's estimates were attributed to "the pride of officers in their corporation, and the belief in their products". In conclusion the court ruled that Zenith, in the absence of the pool, would have made no profits on exports to Great Britain in the first year of the damage period, and would have gradually built up to its full market share by the end of that period (VII A. 3536). It amended its finding to reduce Zenith's treble damages to $15,174,078. (VII A. 3537)

The court of appeals held the finding of damage to Zenith during the relevant period clearly erroneous (IX A. 4254, 4257). It concluded that the World War II embargo and technical barriers rather than the actions of the pool had prevented Zenith from entering the English market (II A. 4257). As it viewed the evidence, it believed that (*ibid.*) "The only rea-

sonable inference is that it (Zenith) was waiting for a change in English standards to a 625 line system.')

C. THE AUSTRALIAN POOL

A number of the same companies involved in the English and Canadian patent pools set up a similar organization in Australia known as Australian Radio Technical Services and Patents Company Pty. Limited (ARTS) (VI A. 2906). Under an exclusive licensing arrangement dated September 11, 1928, and still in effect at the time of trial, Neutrodyne Proprietary Limited, a 70 percent owned subsidiary of Hazeltine, is authorized to place HRI patents in the pool (VI A. 2906–07). The district court found that the only form of license available from the pool was a standard package license limited to manufacture in Australia, and that HRI has been fully aware of this anti-import policy (VI A. 2907).

Wright testified that Zenith had exported no products to Australia since the late 20's or early 30's, when dealers then selling Zenith products had received threats from the Australian pool. While he could not recall any specific request that the Australia pool grant Zenith a license in the 20 years prior to trial, he stated that Australian officials of Stromberg-Carlson and an official of the Rola Corporation, a Zenith licensee (not in Australia) which made components in Australia, had told him that "there was no question in their mind that we could not get such a license, and there was no use talking about any sort of arrangement that contemplated that" (I A. 474–476).

Although the district court did not specifically find that Zenith had sought or desired to enter the Aus-

tralian market during the damage period, or at any time after the early 1930's, it found that the foreign commerce of Zenith "has been drastically curtailed by the patent pools in England, Canada, and Australia" and that Zenith had sustained damages thereby (VI A. 2908). It assessed treble damages of $2,077,665 with respect to Australia (VI A. 2908). This figure was based on Wright and Kaplan's testimony that absent the pool, they would have expected Zenith to have done a tenth as well in Australia as in the United States—*i.e.*, that it would expect to have about 1.5 to 2 percent of the Australia market.

As in the case of England, the trial court thereafter received evidence showing an Australian embargo that had barred imports until April 1960. The findings were amended to reduce the treble damages to $745,380 (VII A. 3539, IX A. 4253).

The court of appeals concluded that the finding of damage with respect to Australia was clearly erroneous (IX A. 4257). It relied upon the government embargo, Zenith's failure to attempt to secure an Australian license, and high import duties (IX A. 4256). It also cited a lack of proof that the Australian pool pursued a licensing policy designed to curb imports (*ibid.*).

D. THE INJUNCTION

Having concluded that HRI's participation in the three foreign patent pools violated the Sherman Act (VI A. 2908, 2912), the district court ruled that Zenith was entitled to injunctive relief (*id.*, 2913). It therefore enjoined HRI from (VII A. 3080):

> C. Entering into, adhering to, enforcing or claiming any rights under a contract, agreement,

> understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market.

The court of appeals, however, set aside this portion of the injunction, stating (IX A. 4261–4262):

> It follows from our conclusion with respect to the foreign patent pools that injunctive relief against "threatened loss or damage" directed at those pools alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U.S.C. Sec. 26.

III. MISUSE OF DOMESTIC PATENTS

HRI has accumulated more than 500 patents, both foreign and domestic, for use in its patent licensing business (VI A. 2893). Its policy has been to grant a standard five-year package license covering all present and future HRI patents. Royalties under this license were computed as a percentage of the retail value of the licensee's total production of radios and television sets, regardless of whether any HRI patent was actually used (VI A. 2893).

In 1959, Zenith rejected HRI's offer to renew its standard package license for monochrome (black and white) patents, contending that it did not require the use of any patents in the package. HRI countered by alleging that Zenith was infringing at least four of its patents, and alternatively offered to license any one of its patents for 50 percent of the package

rate, any two for 80 percent, or any three for 100 percent of the package rate of $50 thousand a year. Zenith rejected this counter proposal (VI A. 2894).

In 1962 and 1963 HRI made two other offers to Zenith, involving color television patents. Under the first of these proposals Zenith would have paid a percentage of the value of its production, up to a maximum of $435,000 for nine color patents, $500,000 for all HRI color patents, or, in the alternative, $150,000 as a package rate for all of HRI's color and monochrome patents. Under the other proposals Zenith would have paid a maximum of $200,000 annually for two color patents, $275,000 for ten, or $300,000 for all existing color patents, or $310,000 for all existing and future Hazeltine color patents (VI A. 2895–97). HRI at the same time offered a package license that would cover all present and future monochrome and color patents for a maximum annual fee of $200,000 (VI A. 2897).

The district court held that the 1962 and 1963 offers constituted attempts to coerce acceptance of the total package (VI A. 2895–2897). The court of appeals affirmed the district court in this point (IX A. 4251–4253), and it is no longer in issue.

The district court held that the "50–80–100" offer of 1959, coupled with the later proposals made by Hazeltine constituted misuse of patents and illegal attempts to extend patent monopolies (VI A. 2902). The court of appeals reversed the finding of the district court as to the "50–80–100" plan (IX A. 4252), holding the offer "reasonable in light of the commercial reali-

ties." It directed that paragraph B of the district court's injunction (VII A. 3079) be modified to permit "licensing of individual patents at rates the sum of which is greater than the package rate so long as the rates for individual patents are not so disproportionate to the package rate as to amount to economic coercion to force the taking of the package" (*id.* 4262). It directed (*ibid.*) two other changes—not in issue here—in this paragraph because of the district court's failure to "describe the acts restrained in reasonable detail" (see p. 22, n. 3, *infra*).

In all proposals to Zenith, Hazeltine included a provision that royalties be based on production of receivers without regard to whether any patents licensed were actually used (VI. A. 2898). The district court concluded that this feature of the Hazeltine offers was unlawful (*id.*, 2910) and enjoined Hazeltine from placing such provisions in agreements with Zenith (VII A. 3079). The court of appeals held that such provisions were not patent misuse, citing *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, and struck this part of the injunction (IX A. 4262).

INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of the parties cover a large number of issues that must be resolved in deciding whether the district court correctly rendered judgment in favor of Zenith on its counterclaim. In this brief, we discuss all but three of these issues. Two of the three—the liability of Hazeltine Corporation to satisfy the judgment [2] and the proper wording of paragraph B of the

[2] Whether Hazeltine Corporation, HRI's parent (VI A. 2893), is bound by the judgment of the district court appears to depend on a stipulation peculiar to this litigation. HRI concedes

injunction[3] appear to be unique to this law suit; the third—the lawfulness of HRI's "50–80–100" license offer—does not seem to have affected the relief granted.[4] All the other issues, however, have significance in the administration of the antitrust laws, and we therefore deem it appropriate for the United States

(HRI Brief, p. 5, n. 4) that under that stipulation "it would stand good for the acts of its parent." Accordingly, we do not in this brief distinguish between the acts of HRI and its parent, but for the purposes of our discussion attribute the acts of each to HRI.

[3] Paragraph B of the injunction entered by the district court (VII A. 3079) apparently required HRI to license any of its domestic patents to Zenith at a royalty less than the lowest price at which HRI, at any time, offered any third party a license of a package that included the patent desired by Zenith. This relief affects only the parties to this suit, and there seems to be no basic dispute as to the propriety of some injunctive relief similar to that granted in paragraph B. We do not disagree with the court of appeals' opinion (IX A. 4262) that paragraph B did not "describe the acts restrained in reasonable detail" or with that court's requirements that the maximum royalties to Zenith be measured by "those presently in effect with other licensees" and not "be given to Zenith for longer periods than they are available to others." We have some doubt about the desirability of the court of appeals' addition to the injunction that allows "licensing of individual patents at rates the sum of which is greater than the package rate so long as the rates for individual patents are not so disproportionate to the package rate as to amount to economic coercion to force the taking of the package." Compare paragraph V(F) of the consent judgment in *United States* v. *Radio Corp. of America*, 1958 CCH Trade Cases ¶69,164, at p. 74,566.

[4] Although the record seems to support the district court's finding that this proposal was part of HRI's attempt to coerce the taking of a package license, and we would suggest that such a licensing formula, to be noncoercive, should rest on differences in the value of individual patents or in the cost of administering a licensing agreement, the court of appeals' ruling on this subject does not seem to have affected the relief allowed.

to express its views on them in response to the Court's invitation.

I

We shall first discuss the questions arising out of the court of appeals' decision that Zenith had failed to prove the "fact" of damage from the operations of the foreign patent pools. This aspect of the case presents two important legal questions involving the standard of proof that a victim of an exclusionary scheme must meet to show injury to his trade or business.

One question concerns the proof that will establish a partial exclusion from the market: when a party claims that an antitrust violation has restricted his sales in a market—as petitioner says of its Canadian business and its sales of radios in England—with what exactitude must it show that it would have had more business and greater profits in the absence of the violation? The other main damage issue involves the standard that must be met when the claim is total exclusion from the market—as Zenith claims with respect to the television business in England and the export of radios and television sets to Australia.

It is not clear to us that the court of appeals recognized the realistic limits on the proof of impact that may reasonably be expected from a party who has been the victim of unlawful restraints upon his entry into a market. The situation is closely comparable to that involved in *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251. In Canada, between 1927 and 1953, Zenith several times attempted unsuccessfully to obtain pool licenses to cover American-made goods. Added to the

rejection of these overtures, the pool, up to the eve of this suit, undertook to avoid and to deter imports into Canada. Zenith's executives testified that these efforts impaired its abilities to find distributors and inhibited its efforts to exploit the Canadian market. Nothing in the record refutes their testimony that Zenith, in the absence of restraints, could be expected to have similar shares of the Canadian and United States markets, and *Bigelow* supports the view that Zenith's failure to offer other corroborative testimony is not fatal to its case.

Insofar as Great Britain and Australia are concerned, the question differs somewhat, since Zenith never sold television sets in England and sold neither radios nor television sets in Australia. To award damages, the finder of fact must determine that but for the violation, the claimant would have entered the market and been able to show a profit. A long line of cases in the courts of appeals hold that the claimant must show that he had both the purpose and the capacity to enter the market. Thus the standard is in part one of the subjective intent and in part one of the physical and financial ability to produce and to deliver. Here, too, the nature and quantum of proof required must be gauged realistically in view of the fact that the more effective the violation, the fewer are the overt efforts that the rational businessman will make to enter a restrained market before bringing suit.

Applying these considerations to the present case, it can be concluded that Zenith established a *prima facie* case of impact upon its attempt to export television sets to England. We do not suggest that the

proof was overwhelming or conclusive, but merely that it was sufficient to place the issue within the province of the finder of fact.

We conclude, however, the findings actually made are inadequate to support an award of damages—as to Canada or England—and that a remand to the district court is necessary for such further findings as can be made on this record.

In addition, we think it was conceded by the trial testimony of Zenith's president that Zenith failed to demonstrate any impact on its ability to export radio receivers to England. We further suggest that Zenith's contacts with the Australian market were so tenuous as to foreclose the district court from finding the necessary intent to export to that country.

II

If the Court agrees that the record would support a conclusion that Zenith was injured in its exports to Canada and its potential of exporting television sets to England, it becomes necessary for an appellate tribunal to decide HRI's contentions that its participation in the Canadian and English patent pools did not violate the Sherman Act. Because of its view that damage was not established and injunctive relief was not warranted, the court of appeals did not reach the questions, and the issues might therefore be remanded to it. Because, however, there is no essential issue of fact and the governing principles of law are well established, the Court may deem it appropriate itself to decide the issue. We therefore discuss the issue and suggest that the district court correctly held that the activities of the Canadian and English patent

pools constituted patent misuse that violated Section 1 of the Sherman Act.

III

We shall then consider the court of appeals' action in striking from the injunction the provisions which barred HRI from further participation in the foreign pools.

Whatever the Court may conclude on the question of damages, the court of appeals' judgment should be reversed insofar as it eliminated these provisions of the injunction. Although the basis of the court of appeals' action is obscure, it apparently reasoned that there can be no injunctive relief unless there has been some injurious impact on the antitrust claimant's trade or business. That plainly is not the proper test. The pertinent question under Section 16 of the Clayton Act is whether a threat of future injury has been shown. It is clear from this record that Zenith will continue to export to Canada and is likely to export television sets to England as well. Hazeltine's prior participation in the patent pools in those countries and the prior threats and refusals to license obviously are an adequate basis for the injunctive relief given by the district court under the standards of Section 16.

IV

As for the issues arising from HRI's misuse of its domestic patents, there is no question before the Court regarding the propriety of the district court's award of $150,000 in treble damages. The court of appeals affirmed that part of the judgment and HRI has not

brought the question here. The principal question on this phase of the case stems from the decision below that HRI's misuse did not include its insistance that royalties on its domestic licenses be measured by the licensee's full production, whether or not the HRI patent is used, and the resulting direction that the pertinent part of the district court's injunction be stricken.

We suggest that the court below misread *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, in holding that HRI may lawfully demand that its licensees pay royalties based on their entire production, whether or not an HRI patent is used. *Automatic Radio* does not, as the court of appeals seems to conclude, authorize such royalty arrangements regardless of the surrounding circumstances, but merely holds that such an arrangement is not *per se* improper. The general vice of such an arrangement is that it extends the patentee's monopoly by allowing him royalties on unpatented as well as patented goods. Moreover, it inhibits invention by the licensee, which, if subject to such a license, is availed nothing if it "invents around" the licensed patent. Thus such a license arrangement tends to forestall invention and technological development, the exact opposite of the purposes underlying the patent clause of the Constitution.

The most that *Automatic Radio* holds proper is the situation where both parties freely agree to the royalty arrangement because other methods of computing a royalty would be cumbersome or impractical. But this is not such a case, and less restrictive alternatives are ordinarily available. In this case the royalty arrange-

ment demanded by HRI must be viewed against the background of Hazeltine's other coercive activities, and the circumstances here do not suggest that the royalty arrangement was voluntarily accepted by or met the convenience of HRI's licensees. *Automatic Radio* should not have been viewed as countenancing HRI's royalty practices.

ARGUMENT

I. WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT ZENITH WAS DAMAGED IN ITS BUSINESS OF EXPORTING RADIOS AND TELEVISION SETS TO CANADA AND TELEVISION SETS TO ENGLAND; AND WHETHER THE FINDINGS OF THE DISTRICT COURT ON THESE ISSUES ARE DEFICIENT IN CRUCIAL RESPECTS

The major question in this case—and the one that obviously is of greatest importance to the parties—is whether the court of appeals was warranted in setting aside the $35 million awarded by the district court for the injury it found Zenith had suffered as a result of the activities of the patent pools. Although the district court found (VI A. 2908) that "[t]he foreign commerce of Zenith has been drastically curtailed by the patent pools in England, Canada and Australia," the court of appeals upon its review of the record, reversed this finding as clearly erroneous, holding that Zenith had not established the "fact" of such damage (IX A. 4253–4261).

The United States has no interest in the resolution of the factual question whether the record does or does not support the district court's finding that Zenith was damaged in its foreign trade as a result of the activities of the pools. The United States is concerned, however, with whether the court of ap-

peals, in reviewing that finding, applied the correct standard, since imposing an unduly heavy burden of proof of injury upon a treble damage plaintiff could seriously weaken the role of private antitrust suits as "one of the surest weapons for effective enforcement of the antitrust laws" (*Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318).

This Court has recognized that the nature of an antitrust violation, generally involving the partial or complete exclusion of the plaintiff from a market, makes it impossible for the plaintiff to prove what his profits would have been had he not been so excluded "with the exactness which would otherwise have been possible" (*Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264). "The tortious acts had in each case precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions" (*ibid.*). As a corollary of this proposition, the Court also repeatedly has recognized that a jury in such a case has broad discretion to find that the plaintiff has been damaged by the defendant's illegal acts and to fix the amount of such damage, even though the evidence on both issues might not have the same specificity and weight that is required in other types of cases. See *Bigelow*, *supra*, and cases there cited; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690; *Minnesota Mining, supra; Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685.

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The present case, of course, was tried to the court rather than to a jury, and a court of appeals ordinarily has somewhat greater leeway in reviewing such findings under the "clearly erroneous" standard in Rule 52(a) of the Federal Rules of Civil Procedure than it has in reviewing jury determinations. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394–395. On the other hand, the considerations noted above that have led this Court to give great weight to jury determinations in private antitrust cases are no less applicable where such cases are tried to the court. It therefore seems appropriate that the appellate courts should give similar deference to the trial court's determinations of injury and damages, when these are based on adequate evidence, and relevant and sufficiently specific findings.

Our review of the record in this case leads us to conclude that, in dealing with Canada and television sets in England, the court of appeals failed to accord such deference to the findings of the trial court, and that the appellate court therefore applied an erroneous standard of review by in effect deciding the factual issues *de novo*.[5] We believe that the evidence relating to

[5] On the other hand, we agree with HRI that the evidence is insufficient to support a finding that Zenith was injured in exporting radios to England or radios or television sets to Australia. Zenith's basic theory was that but for the pools, it would have had a long established business in each of these products during the damage period controverted here. However, once the district court found that the government embargo foreclosed imports into England until June 1959, the determination and measurement of Zenith's injury with respect to the English market was premised on the assumption that Zenith's business in England could in no event have begun

those two countries would justify the trier of the facts in going either way, and that the district court thus had an adequate basis in the record for resolving the issues

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until the end of the embargo. Against this background, we suggest that Wright's testimony forecloses any finding that Zenith was restrained in its business of exporting radios to Great Britain. Wright testified that Ramsey, Zenith's British distributor (I A. 463–464):

> was willing to take a chance to go ahead and see what he could do, at least in the field of radio, to see what the result of this would be. * * *
>
> Apparently the pool has not bothered him insofar as radio is concerned, and I am not surprised at that because, actually there are hardly any radio patents left that anyone would seriously think of threatening infringement with.

In contrast to his testimony about Canada (*id.*, 470–473), Wright did not suggest that the English pool sought to enforce expired radio patents, or that radio distribution was hampered by the lack of television distributors.

To sustain a finding of impact with respect to Australia, the district court must be able to find on this record that Zenith had the intention and the capacity to export to Australia and was stopped from doing so by the Australian pool. See pp. 46–49, *infra*. The evidence fails to allow a finding that Zenith had the necessary intention. To begin with, the Australian findings make no suggestion that Zenith ever intended or desired to establish a business of exporting radios or television sets to Australia (see VI A. 2906–2907); there are not even findings comparable to finding XXI with respect to England and finding XXIX with respect to Canada. (See pp. 45–46 and 52–54 *infra*.)

The only discussion of Zenith's interest in Australia appears in Wright's testimony (*id.* 474) that Zenith had a dealer in Australia in "the early thirties or the late twenties" and "were thrown out * * * by the pool activity." Wright's only other statement of Zenith's interest in exporting to Australia was his testimony of discussing "with officials of Stromberg-Carlson in Australia, Mr. Beam * * * [and] the head of a company that makes components in Australia and is a licensee of ours in

to some extent in favor of Zenith. On the other hand, it is our view that the district court considered the case without appropriate attention to detail, so that its findings are deficient in critical respects, and we suggest that this Court should remand the case to the district court to make further findings on the questions indicated below.

Before discussing the evidence, however, it is important to ascertain what evidence should be considered. After the trial court had entered its findings on January 25, 1965 (almost a year after the case was tried in February 1964, I.A. 110, II A. 935), HRI on March 26, 1965, through newly retained counsel (I A.

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another area—Mr. Webb of the Rola Corporation", who told him "we could not get such a license, and there was no use talking about any sort of arrangement that contemplated that." (I A. 476.)

Apparently the only documentary evidence of Zenith's contacts with the Australian market near the damage period are a group of letters, dated between 1956 and 1960 (DX 215, VI A. 2523–2590). Most are inquiries from people in Australia seeking to buy Zenith radios and Zenith's response. In two, dated December 1956 and March 1957 (*id.*, 2523–2526), Zenith attributed its inability to export to the Australian pool. The later ones do not refer to the pool. The last documents in the group suggest, if anything, that the embargo foreclosed Zenith from Australia (*id.*, 2588–2590).

Whether the evidence here is sufficient to sustain a finding that Zenith had the requisite intent depends, we suggest, on what the ordinary, rational businessman would do in the particular situation to evidence his desire to enter the foreclosed market. Here, however, the indicator of what is reasonable is Zenith's evidence with respect to Canada and England. There is a stark difference between what Zenith said it did in attempting to enter the former areas and its evidence with respect to Australia. Therefore, taking this record as a whole, we see no basis for inferring that Zenith had any intention of building an export business to Australia during the damage period in issue here.

4), moved the district court to withdraw its findings and to reopen the record to receive offers of proof that were then tendered (VII A. 2939–2995). The district court reopened the record "for the sole and limited purpose of submitting proof of damages as to Australia and England" (VII A. 3040; see, also, *id.*, 3031–3039). HRI undertook discovery, and a further hearing was held at which it introduced additional evidence (VII A. 3207–3522) on that issue.[6] On the basis of such evidence, the district court amended its findings on Australia and England, and reduced the damages for the violations relating to these countries (VII A. 3524–3526). The court refused to receive any other evidence, however, stating (*id.*, 3527):

> I want to indicate at this time—there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial.

The court permitted extensive additional offers of proof, which occupy all but the last page of volume VIII of the printed record in this Court (pp. 3547–4129).

Before this Court HRI relies importantly on the material contained in the offer of proof, and urges that the district court erred in refusing to admit it

[6] The evidence (VII A. 3207–3522) was designed to show that government-imposed embargoes, and not the pools, had barred imports of radios and television sets into England and Australia until June 1959 and April 1960, respectively; and that thereafter tariffs and shipping costs would have required Zenith to charge far higher prices than its competitors. To a lesser degree, HRI explored the suitability of Zenith television sets for use in England.

into evidence. It is ordinarily held that the determination whether to reopen a case lies within the informed discretion of the trial court. Here the court permitted reopening on some issues, but not on others. There is no claim that the material in the offer of proof was either unavailable at the time of the original trial or could not have been there offered. In the circumstances it is difficult to conclude that the trial court's denial of this belated request to reopen the entire case was improper. Cf. *Marconi Wireless Corp.* v. *United States,* 320 U.S. 1, 48. Accordingly, we limit our discussion of the evidence to that actually in the record.

A. WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE ACTIVITIES OF THE CANADIAN POOL INJURED ZENITH'S CANADIAN TRADE

1. Zenith must show only a reasonable probability of injury

If, as this portion of our brief assumes, HRI, in contributing its patents to the Canadian pool, participated in an unlawful conspiracy and combination in restraint of the foreign commerce of the United States (see the discussion in Point II, *infra,* pp. 56–57), HRI must respond in damages to the extent that the pool's activities restrained Zenith's ability to compete in the Canadian market during the years in issue here. On this record, the question is whether the evidence is sufficient to support a finding that the pool's unlawful activities reduced Zenith's sales and thereby its profits in Canada.

The controlling legal standards were announced in *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, and

similar cases. In that treble damage action, a motion picture theater operator claimed that a conspiracy among film distributors to deny him first run pictures had injured him. He relied upon two items of evidence as proof of the fact and the amount of damages. The first was a comparison of his profits with the contemporaneous experience of a competing theater, which had access to first run features. The second was a comparison of his profits for the period when the conspiracy affected him with his profits during an earlier period when he had been able to obtain first runs.

The jury found that there was a conspiracy, the court of appeals affirmed, and this Court agreed. The jury awarded damages, but the Seventh Circuit held that the evidence was too imprecise to support the award. This Court reversed, reasoning as follows (*id.* at 264–265):

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co.* v. *Paterson Co., supra,* 561–4; *Eastman Kodak Co.* v. *Southern Photo Co., supra,* 377–9. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrong-

> doing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F. 2d 972, 979. That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. * * *

The Court reinstated the jury verdict, holding (327 U.S. at 264) as it had in *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 377–379, and *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 561–564, "that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

In short, the very nature of the violation in cases such as this—actual or attempted exclusion of a competitor from the market—in itself places serious practical limits on the proof of injury that the antitrust plaintiff may reasonably be expected to produce. He can never show with certainty that he would have

had more business and made more profits. As in *Bigelow*, he must often proceed by comparisons of his experience in the unlawfully restrained business with his or a competitor's experience in a comparable but unrestrained market. Necessarily, such comparisons involve numerous uncertainties and to a large measure rest on speculative factors. They are offered as proof of what *would* have been, when no man can say more than what *might* have happened, if the restraint had not been imposed.

But, as a practical matter, such comparisons often are the best—indeed the only—proof available. To require greater precision and specificity would place the burdens of uncertainty on the victim and not on the wrongdoer, where it properly belongs, and would enable the antitrust violator to diminish his liabilities in direct ratio to the success of his predatory venture. As long as the antitrust plaintiff introduces evidence showing a reasonable probability that the "defendants' wrongful acts and their tendency to injure plaintiffs' business * * * had caused damage to the plaintiffs" (*Bigelow, supra,* 327 U.S. at 264), the trier of the facts is justified in drawing that inference. See, also, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 697, and cases there cited.

2. The evidence permits an inference that the activities of the pool in Canada reduced the business Zenith did there

a. The proof on which the finding of impact in Canada depends falls into three categories: 1) the historical background, which showed that from 1927 until the later 1950's, when Zenith began to import into Canada, the pool actively sought to stop such imports;

2) testimony that the activities of the pool impaired Zenith's ability to establish a distribution network in Canada; and 3) the opinion of Zenith's executives that the American and Canadian markets were sufficiently similar so that, had it not been for the pool's restrictions, they would have expected Zenith to gain the same share of the market in Canada as it enjoyed in the United States. The first two elements show how the pool impaired Zenith's ability to compete in Canada. The third, much like the comparisons used in *Bigelow,* allows the inference that such impairment in fact occurred as a result of the pool's activities.

Between 1927 and 1954 Zenith made a number of unsuccessful attempts to secure a license from the Canadian pool to cover exports from the United States to Canada. At times Zenith was told the pool simply did not grant licenses for import, and at other times the refusal was attributed to Canadian law. (I A. 410–11, 451; DX 146–150, V A. 1982–2013.) When Zenith sought to license distributors in the early 1950's, its dealers were met with threats and they stopped handling Zenith's products (I A. 450–53; DX 155–162, V A. 2022–2065). Zenith knew that the pool actively policed the Canadian market, and threatened dealers and buyers of imported merchandise with infringement actions. These activities continued up to the middle of the 1950's. Then, when Zenith asserted the right, under the licenses it received in the 1957 settlement of its litigation against RCA, General Electric, and Western Electric, to export into Canada, it was met with warnings from the pool that such

exports would infringe the patents still controlled by the pool, including some of Hazeltine's. (I A. 410–412; DX 151–154, VA. 2014–2021)

Thus, at the outset of the 1959–1963 damage period, Zenith's officials had experienced a long and consistent history of attempts by the pool to bar Zenith from exporting to Canada. They had no reason to believe that there was any reasonable prospect that the pool would change its position in the future.

The finder of fact was entitled to conclude that by 1959 the pool, through a course of conduct spanning decades, had done everything possible to convince Zenith that exports to Canada would be met with infringement actions and to convince potential merchandisers and buyers of Zenith products that they too would suffer legal action by dealing in or using imported television sets and radios. The more successful these efforts had been, moreover, the less need there would be for the pool to make similar overt efforts during the damage period. HRI argues (HRI Br. 54) that the lack of proof of specific overt acts—except a threat to a Motorola dealer—during the damage period negates any finding of injury; but the finder of fact was entitled to attribute the pool's relative quiescence during this period to the success rather than the collapse of the pool's opposition.

The effect of this long course of conduct is shown in Wright's testimony of Zenith's difficulties in establishing a network of distributors in Canada. He stated that Zenith had been able to find outlets in the western provinces, but had been forced to use its hearing aid subsidiary to sell its radios and television sets

in the central parts of Canada, and, with lesser success, had used that subsidiary in the Maritime Provinces. He further testified that Zenith had approached potential distributors in these localities, but had found them unwilling to handle Zenith's goods and that they attributed this reluctance to the threat of infringement actions by the pool (I A. 450, 455-456, 458).[7]

The third and final element of proof of impact is the opinion testimony of Wright and Kaplan, Zenith's President and Executive Vice-President and Treasurer. They stated their opinions that Zenith, if allowed to compete without restraint in Canada during the damage period, would have obtained 15 to 20 percent of the market—the same share the company had in the United States (I A. 461, II A. 528). This testimony was founded on Kaplan's assertions that the characteristics of the two markets were similar, that the nature of the competition was similar because many Canadian companies were subsidiaries of American manufacturers, and that Zenith's advertising in the United States would have a "spill over" effect in Canada because American television com-

[7] It is true, as HRI points out (Br. 52), that Wright's testimony is lacking in particulars; once the mid-1950's are passed, there are no specific details given of who was approached or when, and there is no documentary corroboration of the claimed attempts to obtain outlets, as there was regarding similar efforts during the early and middle 1950's. But these factors go to the weight to be given the testimony, and the district court credited it despite these defects.

mercials and publications had some audience in Canada.[8] (I A. 451, 461, 479–480, II A. 509, 528–529).

As Wright and Kaplan acknowledged on direct examination (I A. 56, II A. 528), this testimony necessarily contains some element of speculation. As in *Bigelow,* no person can be certain of the results Zenith would have secured if the pool had not existed, or whether it would have been able to obtain a Canada-wide group of distributors notwithstanding the pool. But in this respect, Zenith's position was the same as that of any other victim of an exclusionary antitrust violation. The proof available to it was restricted by the tortfeasors' conduct. Perhaps it *might* have produced other or more convincing proof. The question, however, is whether it introduced enough evidence to permit the trier of fact reasonably to conclude that it had been damaged by the violation. What the Court said in *Bigelow* is applicable here

[8] HRI contends that the testimony of Zenith's officials as to Canada was "not credible" (HRI Br. 118–124). It relies on testimony regarding the adaptability of American made sets to English usage (as to which see p. 49 n. 9, *infra*) and discrepancies in Wright and Kaplan's testimonies regarding Zenith's expenditures on advertising in Canada. Wright testified at the 1964 trial that Zenith scaled down its Canadian advertising because of the pool's activities (I A. 4900), but Kaplan, after the case was reopened, testified that the expenditures were normal for an attempt being made to enter a new market (VII A. 3459). Under our analysis, Wright's testimony as to advertising is not essential to support a finding of impact as to Canada, and the degree to which these discrepancies affect the weight given other aspects of Wright and Kaplan's testimony is for the finder of fact to determine. There was no discrepancy as to the matters that we suggest would support a decision favorable to Zenith.

(327 U.S. at 265–266):

> [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. * * *
>
> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the plaintiff's rights. *Story Parchment Co.* v. *Paterson, supra* [282 U.S.], 565; and see also *Palmer* v. *Connecticut R. Co.*, 311 U.S. 544, 559, and cases cited.

b. There remains HRI's claim (Br. 47–49) that the release Zenith gave RCA, General Electric and Western Electric in 1957 absolves it as well as them from the damage claims that Zenith has asserted here. That release, given in exchange for $10 million and worldwide licenses of the defendants' patents, released those defendants from further liability for all damages, past or future, resulting from all their acts up to the date of the release. HRI's theory (*id.*, 48–49) is that it is entitled to rely on the release even though it was not a party and was not expressly released—presumably it relies on the common law rule that a release of some joint tortfeasors releases all—and that much of the damages awarded here with respect to Zenith's Canadian business flowed from the pool's activities prior to the release. Zenith has apparently not challenged HRI's assertion that the common law rule determines the scope of a release given in an anti-

trust action. Although we have some reservations that the public interest in the enforcement of the antitrust laws and the Court's interest in the orderly administration of complex litigation are consistent with the general application of that rule in antitrust cases, it does not appear necessary to resolve the point here since Zenith seemed to concede (VII A. 3035) that this particular release extended to liabilities resulting from the pre-1957 acts of all parties to the conspiracy charged in that earlier litigation.

Nevertheless we suggest that there is basis in the record which allows the finder of fact to attribute Zenith's difficulties, at least to some extent, to activities that occurred after the 1957 release. Thereafter Zenith undertook to enter the Canadian market, asserting that the licenses it had obtained relieved it of any obstacle the pool might otherwise have imposed. It soon found that the pool asserted otherwise, and rested its threat of infringement actions in part on Hazeltine patents. These threats and patents, the finder of fact could properly conclude, made Zenith unable to secure proper distribution facilities in the central and Maritime regions of Canada.

On the other hand, we suggest that the settlement of the litigation against RCA, GE, and Western Electric should be taken into consideration in determining the amount of damages. The findings here purport to state Zenith's total losses in Canada, not just those attributable to HRI's actions. Ordinarily, this would be the proper measure of liability, since one conspirator must be liable for the total injury caused by the restraint. But Zenith insisted at trial that the $10 million payment was supposed to compensate it

for damages to its Canadian trade. Under the release, the $10 million covered future as well as past damages from past acts. Without showing unlawful conduct after the release was given, the release barred Zenith from recovery of further damages from RCA, General Electric or Western Electric for the damage period of this case or any other period after September 1957. If, as Zenith seems to concede, the release was intended to cover all members of the pre-1957 pool, HRI should be entitled to the same benefits.

~~Therefore, the burden of proving a proper basis for allocation.~~

It therefore may be, as HRI suggests (HRI Br. 47–49), that it at most must pay for the difference between what Zenith earned in Canada during the damage period and what the district court finds would have been earned if Zenith started from scratch, as it tried to do, after the 1957 settlement.

This theory, to be sure, was not advanced until HRI's post-findings motion. Zenith, however, proved the terms of the settlement at trial. See p. 9, *supra*. Although the release was part of the excluded offers of proof (VII A. 3051–3052), its terms were not in dispute. (See VII A. 3035–3037; see also appendix in the court of appeals, pp. 1882–1885.) It is unclear whether the court, in its post trial action, allowed HRI to assert the release as an affirmative defense, or only allowed a motion to be filed seeking leave to seek such an amendment (see VII A. 3040). If leave was denied, it may be, however, that the ground was not untimeliness, but the view that the release was irrelevant. The district court at least should speak with greater clarity to this issue, and determine whether, on the basis of the evidence, HRI is entitled to a partial set off with respect to Canada.

3. The findings of the district court are inadequate because they do not explain the connection between the pool's activities and Zenith's inability, if any, to find Canadian distributors during the damage period

Thus far, we have discussed the findings that *could* be made on this record; we now turn to the findings that *were* made. We believe that those findings are defective in their failure to state specifically whether Zenith was unable to find Canadian distributors during the relevant 1959–1963 period, and, if so, whether that inability was attributable to the activities of the pool.

The findings recite in detail all of the events that occurred through 1958, but that was before the start of the damage period. The only reference to Zenith's attempts to find distributors is in finding XXIX (VI A. 2905):

> For many years Zenith attempted to set up a distribution for its products in Canada but in every instance where a Canadian distributor began to sell Zenith products he was warned by the pool to stop and return the merchandise or face expensive infringement action. To ward off these attacks Zenith attempted to get a license from the pool, but in every instance it was advised by the pool manager that importation would not be permitted and, only local manufacture would be licensed.

This finding must refer to events that preceded 1957, for it was only for that period that the evidence demonstrates overt threats against Canadian sellers of Zenith products and resulting attempts by Zenith to obtain a license for imports. The trial court made no finding on the essential question whether Zenith was

unable to obtain a full-fledged Canadian distribution system during the damage period, and that the pool caused this inability. Since, under Zenith's theory of the case, this is a necessary element to its claim of damage with respect to its trade in Canada, the case should be remanded to the trial court to make findings on this issue.

B. WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE POOL WAS THE CAUSE OF ZENITH NOT ENTERING THE ENGLISH TELEVISION MARKET

The issue with respect to Great Britain is somewhat different than for Canada, because Zenith never exported television sets to that country in commercial quantities during the 1959–1963 damage period. The question therefore is whether Zenith probably would have sold television sets in England in the absence of the restrictions imposed by the pool, and this in turn depends upon whether (1) the responsible Zenith officials intended to export to England, and (2) Zenith had the capacity as a business enterprise to do so. We conclude (1) that the evidence is adequate to allow the finder of fact to conclude that Zenith had the necessary intent and capacity, but (2) that the findings on this point are not sufficiently specific, so that the case should be remanded for further findings.

1. An award of treble damages for exclusion from a market must be based on findings that the claimant had both the intent and the capacity to enter the market

In proving that his trade or business has suffered injury in a market in which he has never competed, an antitrust claimant faces a unique problem of proof. The courts of appeals have consistently required such

a claimant to prove that it was the illegal activity, and not his own preferences or the physical or financial limitations on his capacity to do business, that led to his failure to enter the market.

This rule has its origin in three cases decided in the Second Circuit in 1908. In *Thomsen* v. *United Castle Mail S.S. Co.*, 166 Fed. 251, the plaintiff alleged that a shipping conference had coerced him into paying unreasonable freight rates, which were to be repaid to him only if he refrained from using carriers who did not belong to the conference. In dismissing the complaint, the district court observed that the plaintiff had obtained his business by agreeing to do business with the conference and that treble damages could not be recovered for injury to "trade which they never had before", 149 Fed. 933, 936. In reversing, the court of appeals held (166 Fed. at 253): "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business."

The other two cases were decided together, ten weeks after *Thomsen*. *Pennsylvania Sugar Ref. Co.* v. *American Sugar Ref. Co.*, 166 Fed. 254 (C.A. 2), involved a claim that the defendants had conspired to prevent the plaintiff from manufacturing sugar by acquiring voting control of the plaintiff's stock. The plaintiff had been out of business for some years because of the Spanish-American war, and had constructed a new plant with a view to beginning anew. The defense in part rested on the ground (*id.* at 260) "that the plaintiff was not engaged in business at the time of the conspiracy; that it had no established business to injure." The court of appeals rejected both this

theory and the argument that recovery should be barred because the plaintiff had no more than "a naked intention to engage in interstate commerce" (*ibid.*).

The third case is *American Banana Co.* v. *United Fruit Co.*, 166 Fed. 261 (C.A. 2). The plaintiff's main claim was that the Costa Rican government, at the defendant's instigation, had seized its plantation and put it out of the banana growing business; the Second Circuit found such acts to be beyond the scope of the Sherman Act, and this Court affirmed, 213 U.S. 347. Alternatively, the plaintiff argued that the defendant had prevented it from buying bananas from other growers for import into the United States. The Second Circuit rejected this contention as a basis for recovery because (166 Fed. at 264):

> * * * it is necessary to state facts showing an intention and preparedness to engage in business. * * * it is not alleged that the plaintiff had made any preparations to engage in the business of buying bananas independently of the operation of its own plantation, nor that it desired or intended to engage therein as a separate and independent business. It is not averred that the plaintiff invested any money in preparing to engage in any such independent business; nor does the extent to which, or even the country in which, it desired or intended to engage therein, appear. * * * Certainly the allegations are too indefinite and uncertain to state a cause of action * * *.

This rule has since been followed and applied in a variety of cases. *E.g.*, *Vasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395–396 (C.A. 6);

Stearns v. Tinker & Rasor, 252 F. 2d 589, 606 (C.A. 9); *Triangle Conduit & Cable Co.* v. *National Elec. Prods. Corp.*, 152 F. 2d 398 (C.A. 3).

This principle is a sound one; it represents the application to this type of antitrust claim of the rule that the claimant must show the defendant's acts were the proximate cause of its injury. If an antitrust plaintiff would not have sought or would not have been able to enter a market even in the absence of the defendant's exclusionary activity, then the violation was not the proximate cause of injury; indeed, where the independent reason for not entering is the claimant's own lack of interest, or own lack of ability, there has been no injury.

2. The evidence is sufficient to support a finding that Zenith would have sold television sets in England during the relevant period but for the pool

After reopening the case to allow proof of the embargoes, the district court found that the government-ally-imposed barrier would have foreclosed Zenith from the English market so long as it existed, independently of the English patent pool. Thus the factual question is whether the evidence allows a finding that after the termination of the embargo in June 1959, Zenith would have sought to enter the English television market but for the existence of the pool (VII A.3524–3526). HRI's contention is that Zenith had no interest in the English market at that time, but was awaiting the decision of the English government on whether television transmissions should be changed from one that scanned 405 lines per second to a 625-

line-per-second system used outside England and for which Zenith's production was designed.

There is no contention that Zenith was incapable of producing a set that could receive the English picture transmissions and that would receive the English sound transmissions, which use AM rather than the FM used in the United States. There is no challenge to Wright and Kaplan's testimony (I A. 464–66; II A. 530–531, 544) that Zenith could have engineered a set for England, that such a set would have used many of the same components as domestic sets, and that production of such sets would have been no more complicated than the addition of a new model to Zenith's domestic line.[9] In addition, there is no suggestion that Zenith could not have produced the number of sets required to engage in business in England; indeed HRI's trial counsel elicited testimony showing that

[9] HRI makes much (Br. 33–39, 87–93) of a claim that Wright and Kaplan's testimony at the 1964 trial that Zenith sets "could" be adapted to receive English systems has been "discredited." No doubt, in their 1965 testimony they at least modified their 1964 assertions. See p. 15 *supra*. They did not, however, retreat from their testimony regarding Zenith's capacity to mass produce a set designed for the English market. The variations in their testimony with respect to the adaptability of the sets Zenith was producing for the American market, of course, bore on their credibility and would have justified the district judge in deciding that other aspects of their testimony were also unworthy of belief. This, however, is not a situation as in *United States* v. *United States Gypsum Co.*, *supra*, where there was a direct conflict between trial testimony and contemporaneous documents; the district court here was therefore free to accept parts of their testimony and reject others, as he gauged credibility. Cf. *United States* v. *Oregon State Medical Society*, 343 U.S. 326.

satisfaction of the percent of the English market that was used as a basis for Zenith's calculation of damages would have required but a very small fraction of the number of sets that Zenith regularly produces. (II A. 543–44)

The essential question rather goes to Zenith's intentions, *i.e.*, did it intend to stay out of the English market until the English government decided whether to change transmission systems? The only evidence indicating that Zenith was awaiting the change in systems is correspondence between it and Ramsey, its English distributor. (See HRI Br. pp. 40–42). These letters, which constituted Zenith's exhibit No. 112 (IV A. 1559–1593), include one written by Zenith in September 1961 and nine written between March and November of 1962, mostly by Ramsey to Zenith. The only letter containing a firm statement that Zenith was awaiting the change is in the November 8, 1962 letter from Ramsey to Zenith, which said: "until such time naturally we cannot start marketing * * *" (IV A. 1593). There is no comparable statement in any of Zenith's letters or in any others of Ramsey. To be sure, each of the extracts quoted by HRI speaks of preparations being made for the anticipated change, and the letters make clear Zenith's intent to begin exports once the change was made. But these statements were all made at the end of the damage period, and are not strong evidence of Zenith's intentions up to three years earlier.

As against these letters, Zenith's officers expressly denied at trial that they were awaiting the change in transmission systems. Wright testified that Zenith had

sought to interest English distributors in handling Zenith television sets, that they had declined, and that the reason for the failure was the distributors' fear of infringement actions by the pool. (See p. 13, *supra*).

In sum, the evidence on this issue is conflicting, and it would support a finding that, absent the pool, Zenith would have sought to enter the market upon termination of the embargo, notwithstanding the fact that the English government might, as of some then undetermined time, change its transmission system. Although the evidence suggesting that Zenith sought television distributors during the damage period is very imprecise, this would not preclude a finding of damage. The victim of a predatory scheme may justifiably conclude that it is useless to seek to enter a market, however much he may wish to. *Bigelow* and the related cases establish that the testimony of Zenith's attempts in the 1950's to find distributors, if credited, and the evidence of the English pool's policies to bar imports would justify an inference that the pool made Zenith unable to find dealers, and this inability continued into the damage period.

3. The findings of the district court are inadequate because they do not explain the connection between the English pool's activities and Zenith's lack of English distributors during the damage period

As with Canada, the findings that were made with respect to England are not sufficiently specific to justify the district court's conclusionary finding that Zenith suffered injury to its trade or business of exporting television sets to England. The one mention

of Zenith's attempt to find English distributors is in finding XXI. It states (VI A. 2901):

> For years Zenith made every effort to export home receivers to distributors and dealers in the English market. On each occasion, however, the Pool threatened its distributors until they ceased buying Zenith products and no substantial trade outlets could be found which would risk handling the line since the Pool would not license the sale of imported merchandise.

First, this finding is inadequate in two respects. It does not indicate the time period to which it relates; since the evidence shows no Zenith television distributors during the damage period, the finding must relate to an earlier period. The very least that is necessary to sustain a finding of impact on this record is a further finding that it was not reasonable for Zenith to expect to find English television distributors in view of the pool's activities.

Second, the finding is that "on each occasion, the Pool threatened its distributors until they ceased buying Zenith products * * *." There is, however, no evidence that Zenith television sets were ever sent to England and met with threats or that threats ever caused distributors to *stop* handling them. On the contrary, Wright apparently testified (I A. 462–464, 473–474) that at no time after World War II could Zenith induce an English distributor to take television sets, except for "a very few" sent Ramsey (*id.,* 464). Rather, the testimony and Zenith's theory was (*ibid.*) that "we

have not made any effort on television because we were informed that the pool license then in effect (sic), and there was no possibility of getting such a license." The documentary evidence Zenith cites to support this finding (Zenith Br. p. A–12) consists of letters between Zenith and English dealers (DX 100–109, IV A. 1512–1545), all dated between 1931 and 1938, stating an unwillingness by one side or the other to have Zenith *radios* exported to England because of the threat of infringement action by the pool.

Thus the finding is responsive to neither Zenith's theory nor the evidence. The district court made no findings on the factual questions essential to a holding that Zenith was injured by being foreclosed from exporting television sets to England. The case should be remanded to the district court to make findings on these issues.

4. If on remand the district court finds that the pool foreclosed Zenith from exporting television sets to England during the damage period, it should redetermine the damages

The damages originally assessed with respect to England were based on Wright's and Kaplan's testimony that, in the absence of the British pools, Zenith would have obtained in England about 25 percent of its market share in the United States; *i.e.*, 3 to 5 percent of the English market. As in the case of Canada, they acknowledged the uncertainty of their assessment, but stated that they had taken into account the differences in the nature of competition and tariff and shipping costs (I A. 465–466; II A. 528–

529). The amount of damages calculated in the district court's original findings accepted this testimony and assumed that Zenith would have had a share in the English market equal to a quarter of Zenith's share of the United States market for each year of the damage period.

After the trial court reopened the record to receive further evidence respecting England and Australia, Wright and Kaplan were recalled. They asserted that at the time of their original testimony, they had known that there were government restrictions on entry into those markets, but were of the view that there was no complete bar and that import licenses could be obtained, albeit with some difficulty. Each asserted that these difficulties had been taken into consideration in their original estimates of the market share they expected Zenith to have in England, that they had assumed Zenith would have started from scratch in England in 1959, that their 3 to 5 percent market figure should be viewed as an average for the four year damage period and they had not intended to suggest that Zenith would have had this share during each of the years in question. (VII A. 3437, 3439, 3441–3444, 3448–3449, 3451–3455, 3469–3471, 3489–493, 3496).

At the end of this hearing, the district court concluded that notwithstanding the English patent pool, the Government's embargo would have foreclosed Zenith imports until June 8, 1960. The court further decided that it should not accept Wright's and Kaplan's testimony to the effect that Zenith, over the damage period, would have averaged 3 to 5 percent of

the English market. The court said of that evidence (VII A. 3525–3526):

> it must be believable in the first instance. And the Court is aware of the pride of officers in their corporation, and the belief in their product, but it is unrealistic to the Court for me to believe that Zenith, as a quality item, selling in excess of locally manufactured items, could have attained the profits for Zenith that are indicated by the guesstimate which everybody indicates is what Exhibit 220 is.

The court then ruled (*id.*, 3526) that damages should be calculated on the assumption that Zenith would have had no profits in England during the first year following the end of the embargo, and would have had 50 percent of the amount Wright and Kaplan projected in the second year, 75 percent for the third year and the full projected share in the fourth year.

These latter conclusions, however, seem to represent the court's own opinion of the success Zenith would have had in England after the embargo. Apart from Wright's and Kaplan's testimony, there is no evidence to support this analysis. Perhaps the district judge simply scaled down that testimony according to his judgment of the degree of puff in those witnesses' opinions. But if that was the theory, the court never said so, and for that reason alone the findings appear inadequate.

Furthermore, if this Court agrees with our analysis of the evidence with respect to Zenith's imports of radios to England (see p. 30 n. 5, *supra*), that would put an entirely different complexion on the measurement

of damages. For the evidence (DX 220, VI A. 2661) shows that Zenith's actual sales of radios in England were far less than the amounts Wright and Kaplan projected. These are the actual sales Zenith had, and Zenith's theory was that its success in television and radio in England would each appear the same in relation to its success in the United States market. Perhaps the district court would on reexamination conclude that Zenith would have had relatively greater success with television sets than it did with radios in England. Be that as it may, if its finding with respect to radios is found unsupported, reexamination of the damages found with respect to television sets would also seem required.[10]

II. HRI'S PARTICIPATION IN THE CANADIAN AND ENGLISH PATENT POOLS UNLAWFULLY RESTRAINED THE FOREIGN COMMERCE OF THE UNITED STATES

Because of the court of appeals' disposition of the damage issue and its elimination of the provision of the injunction barring HRI from further participation in the patent pools, it did not reach the question whether HRI violated the Sherman Act when it allowed the foreign exploitation of its inventions to be controlled by patent pools. If this Court reverses the court of appeals on either of those rulings, the legality of the pools will then have to be decided. Although that issue could be remanded to the court of

[10] In addition, on remand the same factor might lead the district court to reexamine its measurement of damages as to Canada. However, the differences between the Canadian and English markets may be sufficient to warrant a conclusion that Wright and Kaplan's testimony is acceptable with respect to Canada but not with respect to England.

appeals, this Court might deem it appropriate to decide it. The relevant legal questions have previously been settled by this Court, and findings of the district court having adequate support in the record in our view disclose a classic case of violation. We first discuss the governing principles and then their applicability to the Canadan and English pools. We will not discuss the Australian pool because of our view that no damages may be assessed with respect to that country and because the pertinent part of the injunction may be sustained whether or not the Australian pool was lawful.

A. THE SHERMAN ACT IS VIOLATED WHEN A FOREIGN PATENT POOL USES ITS PATENTS TO RESTRAIN EXPORTS FROM THE UNITED STATES

Ownership of a patent allows a businessman to exercise a variety of options that might otherwise be foreclosed to him by the antitrust laws, since a patent represents a seventeen year monopoly over the invention and its exploitation. But the antitrust laws and the patent laws provide limits upon a patentee's use of his monopoly, and an owner transgresses those limits when he employs the patent in a manner that extends his monopoly beyond that inherent in the patent itself.

One touchstone of these limits is that holders of different patents cannot act concertedly to increase the power of each to restrain competitors of both. As in any other context, the Sherman Act requires each seller to act independently, without the assistance of any other seller, in meeting common com-

petitors. For example, two patentees cannot together determine the terms that will be imposed on third persons who use the patents of either. *United States* v. *Line Material Co.*, 333 U.S. 287, 305–315.

In case after case the Court has made clear that Section 1 of the Sherman Act prohibits any concerted acts of patentees that restrain competition. Thus the Court said in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 196–197:

> * * * It is well settled that "[b]eyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law," *United States* v. *Masonite Corp., supra,* at 277, and it "is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act." *United States* v. *Line Material Co., supra,* at 308.

See, also, *Brulotte* v. *Thys Co.*, 379 U.S. 29; *United States* v. *United States Gypsum Co.*, 333 U.S. 364; *Scott Paper Co.* v. *Marcalus Co.*, 326 U.S. 249; *United States* v. *Masonite Corp.*, 316 U.S. 265, 280–281; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 455–456, affirming 27 F. Supp. 959, 965–966 (S.D.N.Y.); *Standard Oil Co.* v. *United States*, 283 U.S. 163, 174; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20; *United States* v. *National Lead Co.*, 63 F. Supp. 513, 5124 (S.D.N.Y.), affirmed, 332 U.S. 319.

Patent pools by their nature involve the most

flagrant form of the abuses condemned in these cases. The phrase "patent pool" is used "to convey the idea of a linking of the right to use patents issued to more than one patentee." *United States* v. *Line Material Co., supra,* 333 U.S. at 313, n. 24. The pool is a combination peculiarly subject to unlawful use, since it represents not a single monopoly, but an aggregation of monopolies which through cumulative effects may control competition in a broad range of products. Because the patents of all participants are subjected to a single control, prices may be made subject to the agreement of all participating patentees, and markets may be divided and entry controlled through restrictions on licenses or assertions of infringement against nonparticipants. When, as here, all significant patents in an industry are within the pool, the pool becomes an all-powerful cartel with complete control over entry, price, production, and distribution.

Perhaps the classic statement of the restraint inherent in such a patent pool is that of Judge Rifkind in *United States* v. *National Lead Co., supra,* 63 F. Supp. at 523:

> To have access to the patents of the combination, the stranger must not only have the consent of the member of the combination in whose "territory" he would operate, but he must adhere to the principles of the combination. The cornerstone of the system was the private regulation of international trade. The suppression of competition was the cement which held the superstructure in place.

> Whether the form of association they created be called a cartel, an international cartel, a patent-pool, or "a technical and commercial cooperation," is of little significance. It is a combination and conspiracy in restraint of trade; and the restraint is unreasonable. As such it is outlawed by Section 1 of the Sherman Act * * *.

Of course, foreign patent pools, like foreign cartels, are themselves not subject to the antitrust laws of the United States. But any such arrangement that restrains commerce between United States and foreign countries violates the Sherman Act, and any participant who is subject to the jurisdiction of the United States courts may here be called to answer. *United States* v. *Pacific & Arctic Ry. & Nav. Co.,* 228 U.S. 87, 105–106; *Thomsen* v. *Cayser,* 243 U.S. 66, 88; cf. *Strassheim* v. *Daily,* 221 U.S. 280, 284–285. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* 370 U.S. at 704; see, *e.g., Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593; *United States* v. *National Lead Co., supra;* cf. *United States* v. *Singer Mfg. Co., supra.*

B. HRI VIOLATED SECTION 1 OF THE SHERMAN ACT WHEN IT KNOWINGLY ALLOWED PATENT POOLS IN CANADA AND ENGLAND TO USE ITS PATENTS TO EXCLUDE AMERICAN MADE PRODUCTS FROM THOSE COUNTRIES

The United States has brought antitrust suits against a number of the participants involved in these

pools. In civil and criminal actions against the Radio Corporation of America, a plea of *nolo contendere* and consent judgments were entered based upon RCA's participation in all three of the pools; and a civil action against General Electric and other American companies based solely on the Canadian pool also terminated in a consent decree. See *United States* v. *Radio Corp. of America* (S.D.N.Y., Civil No. 97–38), 1958 CCH Trade Cases, ¶69,164; *United States* v. *Radio Corp. of America* (S.D.N.Y., Criminal No. 155–107), CCH Antitrust Cases Summaries, 1957–1961, ¶45,058; *United States* v. *General Electric* (S.D.N.Y., Civil No. 140–157), 1962 CCH Trade Cases, ¶¶70,546, 70,428 and 70,342. In the RCA criminal case and the General Electric civil suit, HRI was named a co-conspirator.[11]

In this case the court of appeals did not consider the district court's conclusions and supporting findings of fact that the three pools are conspiracies in restraint of trade and that Hazeltine's knowing participation in them violated the Sherman Act. In this brief, we consider the findings that relate to Canada and England.

1. As for Canada, the finding that the pool's chief purpose was protection of its members from competition by importers (VI A. 2904) is supported by the findings of a Canadian government commission (VI A. 2830), the pool's own license form (V A. 2013),

[11] Although the civil actions were settled by consent judgments which enjoin the defendants from permitting use of their patents by foreign pools to prevent importation by American manufacturers, HRI is not bound by those judgments, and its patents are still available to the pools.

and the testimony of an expert in Canadian patent law and practice (II A. 704–705). HRI's knowledge of the exclusionary purpose and its willingness to permit use of its patents in its furtherance (VI A. 2906) is shown by its correspondence with prospective licensees (V A. 2133–2134) and with the pool (*id.*, 2143–2149).

Until 1957 the English pool agreement expressly required that no licenses be granted for import into England (III A. 1258). In that year the agreement was amended and seemingly would allow imports on terms agreeable to the "committee", composed of representatives of the participating companies, that managed the pool. (DX 60, III A. 1275). However, another portion of the amendment required (III A. 1274) that licenses be granted only "for the purpose of manufacturing * * * within Great Britain, Northern Ireland, Eire, the Channel Islands and the Isle of Man." (DX 70, III A. 1382; DX 71, III A. 1393–1394).

HRI's contribution of its patents to the English pool was effectuated through agreements between it and General Electric Ltd., and those agreements expressly referred to the pool and expressly contemplated that General Electric Ltd. would exercise its functions as HRI's exclusive English licensee through the pool (DX 51, 53 and 58, III A. 1196–1197, 1221, 1267).

Thus the documents demonstrate that the Canadian and English pools continued their purpose of excluding American imports up through the damage period in issue here. These documents also show that HRI

licensed these pools to control the Canadian and English exploitation of HRI's patents with full knowledge of the pool's exclusionary purposes. *Timkin Roller Bearing, National Lead,* and the other cases cited above demonstrate that this conduct is the exact type of restraint on American export trade that the Sherman Act was intended to forbid.

2. While arguing that the issues are not before the Court (HRI Br. 150), HRI advances various reasons why its participation in the pools did not violate the Sherman Act. In substance, these reduce to two theories: *First,* that foreign cartels do not violate the Sherman Act unless an actual impact on American export trade is shown, and *Second,* that the pools, or HRI at least, abandoned their bars on exports. The latter point, we believe, is refuted by the evidence discussed above.

The initial difficulty with HRI's other defense is that the cases do not support its thesis that actual impact must be shown. HRI's argument rests on a statement in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 443 (C.A. 2), that the Sherman Act does not incompass "conduct which has no consequences within the United States."

Of course, if the Court agrees with our view that the evidence would support a finding of impact, *i.e.,* a finding that the Canadian and English pools restrained Zenith's ability to export to those countries, then the pools obviously had "consequences within the United States," and the argument fails for that reason. More importantly, the *Aluminum Co.* statement would appear to be incorrect, if it means that

such impact need be established before the prohibitions of the Sherman Act can be applied to a foreign-based conspiracy which seeks to restrain exports from the United States.

The Second Circuit's suggestion that foreign-based conduct is beyond the ambit of the Sherman Act unless there is impact was based on the view that this Court's decision in *American Banana Company* v. *United Fruit Co., supra,* compels such a result. In *American Banana* this Court held that the Sherman Act did not cover the conduct of an American company that induced a foreign government to seize a competitor's banana plantation. But some two and one-half years later, in *Strassheim* v. *Daily,* 221 U.S. 280, this Court indicated the limited nature of the holding in *American Banana,* saying (221 U.S. at 285):

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. *Commonwealth* v. *Smith,* 11 Allen, 243, 256, 259. *Simpson* v. *State,* 92 Georgia, 41. *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 356. * * *

More recently, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* this Court expressly said, 370 U.S. at 704, 705, that intervening decisions had stripped this part of *American Banana* of its vitality. There the Sherman Act was held to protect an American company from exclusion from Canada, even though the unlawful scheme had been imple-

mented by a defendant which, acting as the direct agent of the Canadian Government, had eliminated the plaintiff's quota for imports into Canada. In terms of the interrelation between the Sherman Act and conspiracies having their foundation or part of their activities beyond the United States, HRI's participation in the Canadian and English pools is no more immune than was the activity of the defendant in *Continental Ore.*

Furthermore, the record refutes the factual premise of HRI's argument that the pools were wholly the work of foreigners. The district court expressly found (VI A. 2900, 2906) that HRI allowed the Canadian and English pools to use its patents with full knowledge of the pool's exclusionary purposes. As we have pointed out above, the documents in evidence fully support this conclusion.

In the instant circumstances knowledge must be equated with culpability. HRI knew that the pools' objectives included the restraint of exports from the United States. By making its patents available to the pool, HRI enlarged the pool's capacity to achieve its objective. Thus an American company turned over the foreign exploitation of its American patents to the foreign patent pools for use in strengthening the barriers the pools sought to erect against the foreign commerce of American manufacturers. Whether HRI's American patents found their way into the pools' control directly, as in Canada, or through an intermediary, as in England, or whether the actual transaction transferring the patents to the pool took place in or out of the United States, is irrelevant.

"Whether the conspiracy was achieved by agreement, by tacit understanding, or by 'acquiescence' * * * coupled with assistance in effectuating its purpose is immaterial.'" *United States* v. *Singer Mfg. Co., supra.*, 374 U.S. at 193, quoting from *United States* v. *Bausch & Lomb*, 321 U.S. 707, 723.

3. HRI raises one other defense of its participation in the Canadian pool. While it agrees (HRI Br. 152) that the pool would not license imports, it argues that it should be absolved of complicity because it believed that Canadian law required the restriction. The district court found that "in the circumstances of this case" Canadian law did not so require. HRI apparently does not challenge this finding (see HRI Br. 154), and it is supported by Wright's testimony that Zenith, in settling its litigation against RCA, General Electric and Western Electric, learned that there was no such legal barrier, at least in the opinion of RCA's patent counsel (I A. 484–485).

HRI's dealings in Canada must be viewed in light of its total course of conduct, and those dealings paralleled exactly its dealings with the other pools. HRI points to nothing that remotely suggests that any Canadian official would have required the exclusion of American radios and television sets. That is the very least that is needed to support the defense tendered here. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra*, 370 U.S. at 702–707.

In the final analysis, HRI's conduct must be judged by United States law, to the extent that the conduct was aimed at the export trade of an American manu-

facturer. If, as HRI claims it believed, Canadian law barred imports, HRI could have satisfied its obligations under Canadian law by unilaterally declining to give licenses for exports to that country. But it is not claimed that Canadian law required HRI to participate in the Canadian pool. When it did so, it participated in concerted action which went beyond even its claimed conception of what Canada required, and this was action which the Sherman Act forbids.

III. THE COURT OF APPEALS IMPROPERLY VACATED THE INJUNCTIVE PROVISION WHICH BARRED HRI FROM PARTICIPATING IN FOREIGN PATENT POOLS THAT EXCLUDE ZENITH FROM EXPORTING TO FOREIGN MARKETS

Paragraph C of the injunction entered by the district court prohibited HRI from (VII A. 3080):

> Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market.

The court of appeals ordered this provision stricken (IX A. 4262). Its sole explanation was that "it follows from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U.S.C. Sec. 26" (*id.* 4261–6262).

Since the court's only conclusion as to the pools was that the "fact" of damage was not established, the court apparently believed that proof of damage is a prerequisite to injunctive relief under Section 16 of the Clayton Act, at least in this case.[12] If so, this appears to be error. Section 16 on its face provides protection against "threatened loss or damage." In *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U.S. 37, 54, this Court stated:

> The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears. The Anti-Trust Act "directs itself against that dangerous probability as well as against the completed result." * * *

The injunction against HRI's participation in the foreign patent pools was proper provided that the record shows a present threat of injury to Zenith by any one of the pools. For Zenith is entitled, in that event, to relief that protects it against the particular

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[12] There is nothing in the court of appeals' opinion that supports HRI's statement (Br. 3) that the court's ruling rested "on the ground that the record, as a matter of fact, did not show a present threat by any one of the patent pools to Zenith's ability to export to Australia, England or Canada." (See, also, Br. 155.) Perhaps the court, in its reference to "threatened loss or damage" in the sentence quoted on p. 68, meant that the lack of impact in the past showed that future injury is not probable. But the court did not so state, and in any event the inference is highly dubious.

misconduct and any comparable activities, wherever they may occur. Of course, if the only finding was that one of the pools was unlawful, the district court could enter an injunction restricted to that country. However, a court of equity need not, and seldom would, so restrict its relief, particularly where, as here, Zenith has evinced an interest in exporting to other countries. The least that could be said is that if HRI participated in one unlawful patent pool, Zenith is entitled to an injunction broad enough to protect it against HRI continuing in that pool or continuing in or joining in comparable pools elsewhere. Because the threat of injury is particularly uncomplicated with respect to the Canadian pool, we will focus on the findings and evidence concerning that pool.

At the time of trial Zenith was, and intended to continue as, an importer of radio and television receivers into Canada. Whether or not the court of appeals was correct in concluding that the pool had not restrained Zenith's Canadian trade during the damage period, the record shows that there is a reasonable probability that the pool will cause future difficulties for Zenith.

The Canadian Royal Commission on Patents, Copyright and Industrial Designs found in 1959 that the pool would refuse to license for import and would threaten infringement actions against importers (VI A. 2830). At least as late as 1958, the pool ran advertisements designed to discourage distributors and retailers in Canada from carrying unlicensed imports (VI A. 2904). In 1958 and 1959 the manager of the

pool expressly warned Zenith that it was infringing the Hazeltine patent which was the basis of this litigation (VI A. 2905). As late as 1962, a Canadian Motorola distributor was warned by the pool against carrying products manufactured without a pool license (VI A. 2054–2056)—plainly, evidence of a continuing desire and effort to inhibit imports. Given the purpose and these activities of the pool, HRI's more than 500 patents covering the electronics industry (VI A. 2893) represent a formidable potential weapon in effectuating the exclusionary design. Moreover, HRI's counsel stated in a deposition introduced in evidence at trial that his client intended to remain in the pool (I A. 178–179).

When a private plaintiff has proved the existence of a long-standing and continuing combination and conspiracy to restrain the type of trade in which he is presently engaged, and the record does not clearly establish that the unlawful activity has or will be irretrievably terminated, or that the unlawful purpose has been abandoned, a sufficient showing of probable loss or damage has been made to warrant injunctive protection without requiring proof of specific current threats directed at the plaintiff. Private actions for injunctive relief, no less than treble damage suits, serve to expose and deter violations of the antitrust laws. To be sure, the promise of treble damages is usually thought of as the principal incentive to assertion by private parties of antitrust rights, but the plaintiff and the public also have a strong interest in securing legally enforceable protection for the future. Any requirement of

an unduly rigid standard of proof of threatened damage to support injunctive relief against proven unlawful conduct would substantially reduce the effectiveness of private antitrust actions as a means of stopping actual and threatened violations.

The Canadian pool and HRI's participation in it continued through the litigation of this case. Zenith, it is true, managed to export radios and television sets to Canada during this period. Even assuming, however, that those exports represented the maximum potential of Zenith's business in those years, the fact remains that HRI and the pool made continuing efforts during the fifties—up to the eve of suit—to bar Zenith from Canada. If, in these circumstances, the district court is powerless to grant equitable relief, then any antitrust defendant can avoid injunctive proscriptions merely by foregoing the outward manifestations of his exclusionary designs during the pendency of his victim's suit. Courts of equity have never—in antitrust or in any other sort of case—allowed their corrective powers to be thus circumvented.

Once a course of conduct such as HRI's has been proven, only the most conclusive proof of the impossibility of recurrence should avoid the injunction. Nothing of that sort is present here—in the record or without[13]—and paragraph C of the injunction should be reinstated.

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[13] HRI asserts here that injunctive relief is not necessary because it has taken its patents out of the Canadian pool since the trial (see Westermann affidavit, HRI Br. A–29). This Court has often made clear, however, that injunctive relief is not

IV. HRI MISUSED ITS DOMESTIC PATENTS BY DEMANDING THAT ZENITH PAY ROYALTIES ON ITS ENTIRE PRODUCTION, INCLUDING UNPATENED ARTICLES

As the district court found (VI A. 2898):

> In all of its proposals to Zenith, Hazeltine insisted as an alternative to litigation that Zenith for a period of five years pay royalties in large sums based on its entire production of receivers whether or not any Hazeltine patent was employed in any way in its products. Plaintiff thus insists that royalties be paid on admittedly unpatented apparatus.

In its conclusions of law, the court ruled (VI A. 3909–3910) that this aspect of the proposals

> in and of itself constitutes an illegal attempt to extend the patent monopolies. * * * Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that

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barred by abandonment of challenged practices in the face of litigation or judgment. *E.g.*, *United States* v. *Concentrated Phosphate Export Assn.*, 37 L. Week 4045, 4046; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632. That principle should be especially applicable where, as here, the withdrawal from a long-standing and profitable relationship comes only after entry of the very injunction now sought to be avoided. Indeed, the affidavit on its face (HRI Br. A–30) recites a belief in the legality of Hazeltine's agreement licensing its patents to the pool. Without the protection afforded by the injunction, there is neither assurance nor even reason to believe HRI will not again place its patents within the pool.

> may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties in unpatented products.

To implement these findings and conclusions, the district court, in paragraph A of its injunction, barred HRP from conditioning licenses of "any domestic patent * * * upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent" (VII A. 3079).

The court of appeals ruled that this practice did not constitute misuse of patents and struck the pertinent part of paragraph A (IX A. 4262). The court did not consider whether, in the context of this case, such provisions were reasonable, but merely cited *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, in support of its conclusion (VII A. 4262).

Automatic Radio does not support the court of appeals' decision. The Court there held only "that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales" (339 U.S. at 834). The Court reasoned that since it would be permissible to require a lump sum payment as consideration for an option to take a license on a large package of patents, there could be no objection to a running royalty on sales of all products, patented and unpatented, based on a fixed percentage of sales volume. The result was expressly premised on the licensee's concession (*id.*, 831) that the tie-in cases did not apply, its abandonment (*ibid.*) of an assertion that Hazeltine would grant only package licenses of all its patents, the

absence (*id.*, 832) of proof of a conspiracy, and a failure to prove (*id.*, 834) other charges of misuse.

Here the situation is far different. HRI's insistence on and attempts to coerce a package license are proven. The parallel between its domestic licensing activities and its foreign conspiracies is obvious. Its scheme for measuring royalties must be viewed against the full panoply of patent misuse that was found by the district court.

Against this background, a substantial extension of *Automatic Radio* would be necessary to support the court of appeals' result. We submit that such an extension would be unwise.

In this Court's view, the element needed to establish illegality which was missing in *Automatic Radio* was a demonstration that Hazeltine's method of determining royalties represented "the extension of the monopoly of the patent to create another monopoly or restraint of competition—a restraint not countenanced by the patent grant" (339 U.S. at 832). With such proof, the same result could not have been reached, for numerous cases make clear that a patent may not be exploited in a way that seeks or secures such an extension of its monopoly. Thus, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, *Morton Salt Co.* v. *Suppiger Co.*, 314 U.S. 488, and *B. B. Chemical Co.* v. *Ellis*, 314 U.S. 495, all show that a patentee cannot require a licensee to take an unpatented article together with the patented one.

Moreover, although the patent laws are designed to foster technological innovation, see *Scott Paper Co.*

v. *Marcalus Co.*, 326 U.S. 249, 255, computation of royalties on total production—including production not involving the licensed patents—tends to have the opposite effect. Such a royalty obviously removes any incentive a licensee may have to "invent around" the patent, since the royalty must be paid even if a patent-free way is discovered to produce the product.

In *Automatic Radio* the Court suggested that such a royalty provision may be justified as "the most convenient method of fixing the business value of the privileges granted by the license agreement" (339 U.S. at 834). There may, of course, be some situations where it is difficult to determine whether or not an end product incorporates or itself infringes one or more of the licensed patents. But even where this is so, less restrictive alternatives are ordinarily available. Indeed, if the licensee cannot readily determine whether its product does or does not incorporate or infringe one of the licensor's patents, it can decide unilaterally to avoid the risk of an infringement suit by paying a royalty on the product. At best, it might in certain situations be reasonable for the licensor to shift to the licensee, as a condition for non-payment, the burden of proving that his product does not infringe the licensed patents.

Assuming *arguendo* the correctness of *Automatic Radio*,[14] its rational should apply only to situations where it is proven that the parties, bargaining as equals, freely agreed that computation of royalties

[14] If necessary to the decision here, we would contend that *Automatic Radio* should be overruled.

on total production would serve the convenience of both. The convenience of the licensor alone cannot justify such an extension of the patent monopoly, and the anticompetitive potentials of such a royalty arrangement are too clear to warrant an assumption that is the product of arms-length bargaining. See *Mercoid* v. *Mid-Continental Investment Co., supra,* 320 U.S. at 666; *B. B. Chemical Co.* v. *Ellis, supra,* 314 U.S. at 498.

The record here demonstrates that this form of royalty did not involve the mutual convenience of the parties and did involve an over-all design of patent misuse. The district court found that the requirement that royalties be paid on total production was a part of HRI's policy in licensing electronics manufacturers in the United States (VI A. 2893). Nothing suggests that the nature of the electronics business requires this approach as a convenience, and it plainly is not required as an aid to enforcement since radios and television sets are mass produced items and details of their circuitry are readily available. Plainly, the provision was not designed to meet the needs or convenience of Zenith.

Although Zenith appears never to have specifically objected to the provision, it did reject each package or alternative offer after 1959 of which the provision was a part; the district court found that each of these offers was an unlawful attempt to compel acceptance of the standard package as a condition for receiving a license under any patent therein; and the court of appeals agreed except as to the 1959 offer. Thus, this record fully supports the district court's conclusion

that the royalty provision was part of HRI's misuse of its patents.[15] The injunction against requiring payment of royalties on unpatented apparatus should be reinstated.

CONCLUSION

In our view, the judgment of the court of appeals should be reversed insofar as it determined that Zenith had failed to demonstrate injurious impact upon its trade of exporting radios and television sets to Canada and television sets to England, that injunctive relief is inappropriate with respect to HRI's participation in foreign patent pools, and that HRI's misuse of its domestic patents did not include its demand that licensees pay royalties with respect to their full production. The judgment should be affirmed to the extent that it holds that Zenith failed to demonstrate injurious impact with respect to its export of radios

[15] See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 389, 400, where this Court recognized that a license arrangement whereby royalties based on the value of unpatented as well as patented products contributed to the restraint of trade found in that case.

to England and had failed to demonstrate an intention to export radios and television sets to Australia. The case should be remanded to the district court for further findings on this record with respect to whether Zenith suffered injury in its trade with Canada and England, and if so, the amount of HRI's liability.

Respectfully submitted.

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JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969